Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

*Debtors.*

INOCO PLC,

*Petitioner,*

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether it was just and practicable for the United States Court of Appeals for the Ninth Circuit to retroactively apply amended Bankruptcy Rule 7004(f) to the underlying adversary proceeding to find personal jurisdiction over the Petitioner, a foreign corporation which would not otherwise be subject to personal jurisdiction, when the amendments took effect after the applicable statutes of limitations for the underlying claims for relief had run, nearly two years after the Petitioner's motion to dismiss, nearly three years after the commencement of the adversary proceeding and over five years after the purported jurisdictional events took place?

## PARTIES TO THE PROCEEDING

Petitioner is Inoco Plc, a United Kingdom corporation now known as Inoco Limited, which was a defendant-appellant in the Court of Appeals. Inoco Limited's parent company is Lawgra, Plc; it has no nonwholly owned subsidiaries.

Respondents are Bernard Goodson, Ford Elsaessar, Lowell Finley and Jay J. Miller who were plaintiffs-appellees in the Court of Appeals. Respondents are the trustees of a litigation trust formed for the purpose of prosecuting the claims asserted in an amended complaint filed in the United States Bankruptcy Court for the District of Idaho on November 30, 1994, on behalf and for the benefit of substantially all of the unsecured creditors of Gulf USA Corporation and its wholly owned subsidiary, Pintlar Corporation, the reorganized debtors.

David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran were also defendants-appellants to the Ninth Circuit appeal.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Inoco Plc ("Inoco" or "Petitioner") respectfully requests that this Court issue a Writ of Certiorari to review the order and opinion of the United States Court of Appeals for the Ninth Circuit filed November 3, 1997 and amended January 14, 1998 in this matter.

## OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 133 F.3d 1141 (9th Cir. 1998), and is reproduced in the Appendix[1] at A 1a-14a. The opinion of the United States District Court for the District of Idaho is not reported, and is reproduced at A 34a-57a. The opinion of the United States Bankruptcy Court for the District of Idaho is not reported, and is reproduced at A 79a-168a.

## STATEMENT OF JURISDICTION

The opinion and order of the Court of Appeals was filed on November 3, 1997 and, after rehearing, amended on January 14, 1998 (A 1a-14a). The jurisdiction of this Court to review the opinion and order of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

This case involves the Court of Appeals' erroneous retroactive application of amended Bankruptcy Rule 7004 to the underlying adversary proceeding. The former Bankruptcy Rule 7004, in effect through November 30, 1996, is set forth at A 169a-173a. The revised Bankruptcy Rule 7004 is set forth at A 174a-178a.

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[1] Since the appeals of Petitioner and of David J. Rowland ("Rowland"), Jeremy E. James ("James"), David L. Hudd ("Hudd") and Derek J. Moran ("Moran," and collectively with Rowland, James and Hudd, the "Rowland Directors") were consolidated in the courts below and the Rowland Directors are also Petitioning this Court for Writ of Certiorari, Petitioner Inoco will rely on the Appendix submitted by the Rowland Directors. References preceded by "A" herein refer to pages in the Appendix accompanying the Petition submitted by the Rowland Directors.

## STATEMENT OF THE CASE

### A. Introduction

Petitioner is a foreign corporation with no contact with the State of Idaho (A 123a). Nevertheless, it has been sued in the United States Bankruptcy Court for the District of Idaho in connection with alleged wrongs which, again, were not committed in Idaho. Ever since the commencement of the adversary proceeding against it and others in 1994, Petitioner has been contesting jurisdiction. No doubt recognizing that both the Bankruptcy Court and the District Court erred in finding that sufficient facts had been stated by Respondents to withstand a motion to dismiss for lack of personal jurisdiction based on the misapplication of the "conspiracy" theory of jurisdiction to this case, the United States Court of Appeals for the Ninth Circuit did not address this basis for the lower courts' findings. Instead, the Ninth Circuit retroactively applied a new amendment to Bankruptcy Rule 7004, which confers jurisdiction over non-resident defendants so long as the exercise of jurisdiction is consistent with the Constitution. Rule 7004(f) provides:

> (f) *Personal Jurisdiction.* If the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code, or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

Fed. R. Bankr. P. 7004(f) (A 177a-178a). Accordingly, the Ninth Circuit held that, if properly served, personal jurisdiction can be asserted over such defendants by any bankruptcy court, so long as they had contacts with the United States. Thus, the Ninth Circuit has effectively created jurisdiction over

Petitioner where none previously existed, long after the predicate acts conferring jurisdiction occurred, and long after the applicable statutes of limitations for the various claims for relief alleged against Petitioner have expired, thereby significantly impacting upon its rights, liabilities and remedies.

Under the circumstances, the Ninth Circuit should be reversed and the amended complaint dismissed against Petitioner. At the very least, the matter ought to be remanded for a hearing to determine whether the retroactive application of amended Bankruptcy Rule 7004 was just or practicable in this case.

**B. Factual Background**

At all relevant times, Petitioner was a publicly traded United Kingdom corporation headquartered in England (A 86a). It never has had an office outside England. It is undisputed that not only has Petitioner never had any office in Idaho, but it never employed anyone in Idaho, never owned property in Idaho, never had any bank or brokerage accounts in Idaho, never negotiated or executed any contract in Idaho, never consented to jurisdiction in Idaho, and never appointed any agent for service of process in Idaho.

In 1989, an Inoco subsidiary, Downshire N.V. ("Downshire"), acquired a large interest in the stock of Gulf USA Corporation ("Gulf"), a Delaware corporation that was headquartered in Boston, Massachusetts (A 86a). At the same time, the Rowland Directors, each of whom was an officer and/or director of Petitioner, joined Gulf's Board of Directors and/or became an officer of Gulf. In addition, Gulf, Petitioner and the Rowland Directors entered into a "Standstill Agreement" pursuant to which any transactions between Gulf and Petitioner, the Rowland Directors or their affiliates required the approval of two-thirds of Gulf's directors, in consequence of which, Gulf's independent directors had the ability to veto

any such transaction (A 84a-87a). Petitioner itself subsequently acquired some additional Gulf stock.

In July 1991, Petitioner and Downshire sold all of their Gulf stock to Nycal Corporation ("Nycal"), an unrelated publicly held Delaware corporation (A 99a). Immediately thereafter, disputes arose between Nycal and Petitioner with respect to Gulf, and Petitioner commenced a lawsuit in England. In October 1991, these disputes were settled. As part of the settlement, Nycal, Gulf and a Gulf subsidiary executed and delivered general releases to Petitioner (A 100a).

During 1989-91, while Petitioner and Downshire held Gulf stock, Gulf was headquartered in Massachusetts (A 85a), conducted *no* commercial activity in Idaho and was not even qualified to do business in Idaho. The business of Gulf and its subsidiaries consisted primarily of oil and gas operations in Texas and Louisiana, coal operations in Pennsylvania and real estate operations in New Zealand. A former Gulf subsidiary, Bunker Hill Company ("Bunker Hill"), previously had conducted mining and smelting activities in Idaho, but the Bunker Hill mine had closed in 1981 and been sold to an unaffiliated purchaser in 1982. Gulf remained responsible, however, for some obligations that had been incurred by Bunker Hill prior to its sale and was named by the Environmental Protection Agency as a potentially responsible party for environmental damage that had occurred at the Bunker Hill mining site (A 85a -86a).

Ten years after the sale of Bunker Hill, *i.e.*, in 1992, which was *after* Petitioner and Downshire had sold their Gulf stock to Nycal, and *after* Gulf had delivered a general release to Petitioner, a Gulf subsidiary, Pintlar Corporation ("Pintlar"), reacquired the Bunker Hill mining site in connection with the bankruptcy of the site's owner (A 85a-86a). In October 1993, creditors filed involuntary bankruptcy petitions against Pintlar and Gulf in the Bankruptcy Court in Idaho (A 39a).

Gulf initially contested the Idaho venue and filed a voluntary petition in Delaware, but subsequently consented to the issuance of bankruptcy relief in Idaho.

### C. The Underlying Litigation

On January 27, 1994, Gulf, as debtor-in-possession, commenced the underlying litigation as an adversary proceeding in the Bankruptcy Court in Idaho. An amended complaint was filed in November 1994 and added two plaintiffs: (1) Gulf's subsidiary, Pintlar, as debtor-in-possession; and (2) Pintlar's President, H.P. Harbert, as trustee of a litigation trust to which Gulf and Pintlar had assigned claims (A 84a). After confirmation of the Gulf and Pintlar plan of reorganization, Gulf, Pintlar and Harbert were replaced as plaintiffs by four individual trustees who succeeded Harbert as trustee of the litigation trust.[2] The amended complaint names 32 individuals and corporations as defendants. The named defendants include, in addition to Petitioner, the Rowland Directors, Nycal, several individuals who were affiliated with Nycal, and Gulf's own independent directors. Downshire is not named as a defendant.

### D. The Amended Complaint

The amended complaint contains nine counts, eight of which name Petitioner as one of the defendants. It alleges that the Rowland Directors, while serving as officers and directors of Gulf, engaged in a scheme to "loot" Gulf, and that Gulf thereafter continued to be looted by the Nycal appointees who succeeded the Rowland Directors on Gulf's board. The key allegation against Petitioner is that the Rowland Directors

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[2] On January 25, 1996, Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller, as trustees of the litigation trust, replaced Gulf, Pintlar and Harbert as plaintiffs. Goodson, Elsaesser, Finley and Miller will hereinafter be referred to as Respondents (A 62a-65a).

used Petitioner as a vehicle to gain control of Gulf during 1989 and then used that control to "loot" Gulf. Except for allegations (described below) that Petitioner received fraudulent conveyances in four of the many transactions by which Gulf allegedly was looted, there are no allegations of any acts by Petitioner that constituted participation in the alleged scheme to loot Gulf, or of facts that would indicate that Petitioner itself was anything other than a passive shareholder, directly and through Downshire, of Gulf.

With respect to the amended complaint's assertions that Petitioner received fraudulent conveyances from Gulf, the alleged fraudulent conveyances relate to four specific matters. None of these matters had anything to do with Idaho, or with the Idaho acts by other defendants (*i.e.*, Rowland, James and Hudd) on which the exercise of long-arm jurisdiction over Petitioner in Idaho was premised. Pursuant to the Standstill Agreement, all of these transactions were approved by Gulf's independent directors.[3]

The amended complaint also contains three claims in which Petitioner is not alleged to have participated. None of these transactions occurred in Idaho or involved the alleged acts by other defendants on which jurisdiction over Petitioner in Idaho is premised. This amended complaint thus contains: (1) a claim that six transactions, four of which are not even alleged to have included Petitioner as a participant, and none of which had anything to do with Idaho, constituted breaches of the Standstill Agreement, which required approval by Gulf's independent directors of transactions between Gulf and

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[3] These four transactions are (1) Gulf's alleged rental from Petitioner of office space in *New York* and *London* (A 89a); (2) Gulf's alleged payment of compensation to individuals employed by Petitioner in *England* (A 89a); (3) Gulf's alleged purchase from Petitioner of stock in a corporation that held a contract to acquire real estate in *Texas* (A 94a-95a); and (4) the settlement among Nycal, Gulf and Petitioner that was entered into in *England* in October 1991, after Petitioner had divested itself of its interest in Gulf (A 100a).

persons related to the Rowland Directors or Petitioner;[4] (2) a claim for an alleged violation of Delaware General Corporation Law § 160, which supposedly prohibited certain stock repurchases by Gulf in which Petitioner is not alleged to have participated; and (3) a claim that seeks to toll statutes of limitation against defendants, including Petitioner, by reason of misrepresentations allegedly made by defendants other than Petitioner.

Finally, the amended complaint includes a conclusory claim that Petitioner participated in a "civil conspiracy" with the Rowland Directors and other defendants to "accomplish unlawful purposes" involving each of the many transactions in which *Gulf* is alleged to have engaged while Petitioner and Downshire owned Gulf stock. Petitioner is not alleged to have had any involvement in most of these transactions, and none of them is alleged to have occurred in Idaho or to have involved the alleged Idaho acts by the Rowland Directors on which jurisdiction over Petitioner in Idaho is premised. In all events, as the longest applicable statute of limitations for any of the claims for relief is five years, it is clear that by December 1, 1996, the date that the amended bankruptcy rules took effect, each of the claims for relief would have been barred by the relevant statute of limitations.[5]

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[4] The two transactions in which Petitioner is alleged to have participated are (1) the *New York* and *London* office rentals, and (2) the alleged payment by Gulf of compensation to employees of Petitioner in *England* (A 89a).

[5] Count I is governed by 11 U.S.C. § 546(a) (earlier of (1) the later of (a) two years after order for relief or (b) one year after appointment of the first trustee and (2) the time the case is closed or dismissed). Count II, for breach of fiduciary duties, corporate waste and mismanagement is governed by I.C. § 5-217 and I.C. § 5-224 and has a statute of limitations of four years. Count III, for misrepresentation is governed by I.C. § 5-218(4) and has a statute of limitations of three years. There is no statute, nor any case law, creating a separate cause of action, let alone a statute of limitations for Counts IV and V, seeking damages for aiding and abetting and civil conspiracy. Count VI, breach of the Standstill

## E. The Jurisdictional Motions

Petitioner, the Rowland Directors and several other defendants moved to dismiss this litigation for lack of personal jurisdiction (and, in the case of some defendants, insufficient service of process). The parties submitted affidavits and declarations; no evidentiary hearing was held.

The basis of Petitioner's jurisdictional motion was that it had had no contacts whatsoever with the forum state of Idaho, whose long-arm statute was controlling pursuant to Fed. R. Bankr. P. 7004(e). It was undisputed on the motion that Petitioner was at all relevant times a publicly-traded corporation organized under the laws of the United Kingdom, headquartered in England, with no offices outside England; that Petitioner never had any offices in Idaho, never employed anyone in Idaho, never owned any property in Idaho, never had any bank or brokerage accounts in Idaho, and never transacted any business in Idaho; that Petitioner never negotiated or executed any contracts in Idaho; and that Petitioner never consented to jurisdiction in Idaho or appointed any agents in Idaho to accept service of process.

The Respondents' submissions attempted to link numerous individuals, including but not limited to the Rowland Directors, to an alleged "conspiracy" to "loot" Gulf, but Respondents' extensive papers contained no evidence of any Idaho contacts by Petitioner or any evidence that Petitioner participated in a conspiracy beyond the bare-bones fact that the Rowland Directors were officers or directors of Petitioner at the same time that they were officers or directors of Gulf. Petitioner responded with a declaration by its Chief Executive

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Agreement, is governed by I.C. § 5-216 and has a statute of limitations of five years. Count VII, seeking damages for violation of Delaware General Corporation Law Section 160 has a statute of limitations of three years. Count VIII seeks to toll all statute of limitations due to fraud which is governed by a statute of limitations of three years. Count IX seeks to avoid the releases on account of fraud and is likely governed by I.C. §5-218(4) and has a statute of limitations of three years.

Officer, Graham J. Robeson. Robeson categorically denied that Petitioner had been part of any conspiracy, and further denied that the Rowland Directors' alleged acts had been taken by them as Petitioner's agents.

### F. The Bankruptcy Court's Decision

In a memorandum of decision entered on September 29, 1995 (A 79a-168a) and order entered November 1, 1995 (A 69a-72a), the Bankruptcy Court dismissed the claims against eleven moving defendants on jurisdictional grounds, granted a motion to quash the service upon an additional defendant, and for the most part denied the motions to dismiss by Petitioner and the Rowland Directors.

The Bankruptcy Court premised its denial of the motion to dismiss *solely* on the basis of a "conspiracy" theory of jurisdiction. The court acknowledged that the "circuits are split" (A 121a) as to the propriety of such a theory, and that "courts in the Ninth Circuit which have addressed the issue of imputed jurisdiction have rejected the conspiracy doctrine" (A 147a n.13). The Bankruptcy Court nevertheless adopted the theory, relying principally on *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1392-93 (7th Cir. 1983), which characterized the theory as "based on the 'time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy.' " 711 F.2d at 1392 (quoting from *Gemini Enterprises, Inc. v. WFMY Television Corp.*, 470 F. Supp. 559, 564 (M.D.N.C. 1979)) (A 122a). Ignoring the fact that the Ninth Circuit specifically warned in *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990), that "[l]iability and jurisdiction are independent," so that "[r]egardless of their joint liability, jurisdiction over each defendant must be established individually," the Bankruptcy Court elected to follow *Textor* and adopt that decision's "conspiracy" theory.

The Bankruptcy Court, for purposes of the motion, treated Respondents' allegations as if they were true (A 103a). Thus, the Bankruptcy Court imputed the alleged forum-related acts of Hudd and Rowland to Petitioner, and found that Respondents had pleaded sufficient facts, which if proven, would subject Petitioner to personal jurisdiction for those claims that supposedly arose from the alleged conspiracy (A 123a-124a). The court then went on, erroneously, to analyze the issue of whether the exercise of personal jurisdiction over Petitioner in Idaho was consistent with due process by examining Petitioner's contacts with the United States as a whole rather than just Petitioner's contacts with Idaho (which were non-existent) (A 144a-146a).

The Bankruptcy Court did grant the motions by Petitioner and the Rowland Directors to the extent of dismissing that portion of one claim that alleged "corporate waste" and "mismanagement." It concluded that those claims could not be brought in Idaho on the basis of "conspiracy" jurisdiction because they sound in negligence rather than intentional tort and therefore cannot have been part of a "conspiracy" (A 120a-121a).

### G. The Appeals To The District Court

Petitioner and the Rowland Directors moved for leave to appeal to the District Court, which was granted (A 66a-68a). The District Court also consolidated the two appeals (A 58a-61a).

In a memorandum decision and order entered on August 16, 1996, the District Court affirmed the Bankruptcy Court's denial of Petitioner's and the Rowland Directors' motions with respect to all tort (and "tort-like") claims. It reversed the Bankruptcy Court, however, to the extent of (1) dismissing one of Respondents' claims (*i.e.*, Count VI, the claim for breach of the Standstill Agreement), and (2) reinstating the "corporate waste" and "mismanagement" components of

Respondents' claim for breach of fiduciary duty (*i.e.*, Count II) (A 34a-57a).

The District Court premised its finding that Respondents had stated sufficient facts which, if proven would subject Rowland, James and Hudd to the court's jurisdiction on their alleged direct contacts with Idaho, which consisted of: (1) in Rowland's case, his signature, as an officer of *Gulf*, on a single letter on *Gulf* letterhead, which was sent by *Gulf* to former employees of the Bunker Hill mine and their families and assured them that *Gulf* would meet its obligations to creditors (A 38a, 49a-50a); (2) in the case of Hudd, his attendance at meetings in Idaho, exclusively with *Gulf* personnel, allegedly to prepare for negotiations with *Gulf's* environmental creditors, and his participation in telephone calls with *Gulf* personnel in Idaho, allegedly to discuss *Gulf's* environmental problems, and his request for and receipt of newspaper articles about *Gulf's* responses to environmental obligations (A 38a, 50a); and (3) in the case of James, his attendance at a single meeting in Idaho, exclusively with *Gulf* personnel, allegedly to prepare for negotiations with *Gulf's* environmental creditors (A 38a, 51a).[6]

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[6] Neither Rowland, Hudd nor James is alleged ever to have met or spoken to any creditor of Gulf. The Bankruptcy Court also relied on an affidavit in which Harbert, Pintlar's former President, alleged that Hudd and James had directed him to implement strategies that, in retrospect (but not at the time), he believed had the purpose of delaying action by Gulf's creditors, and that Hudd had attended a meeting with the Governor of Idaho (A 118a). As the District Court acknowledged, after the Bankruptcy Court had issued its decision, Harbert submitted a supplemental affidavit in which he retracted his prior assertion that Hudd had met with the Governor of Idaho, and corrected several other details in his prior statements about Hudd and James (A 38a-39a n.6). Remarkably, the District Court stated that these "admitted errors by Harbert are not grounds for discounting his remaining declarations" (A 39a n.6), which it continued to accept at face value notwithstanding Harbert's retraction of his most sensational charge.

In contrast to the basis for personal jurisdiction over Rowland, James and Hudd, the District Court premised personal jurisdiction over Petitioner (and co-defendant Moran) solely upon a "conspiracy" theory of jurisdiction (A 51a-52a). The District Court acknowledged that "[n]either Moran nor Inoco are alleged to have personally directed any action at Idaho that caused harm within the state," but it asserted that "each is alleged to have acted in concert with the other defendants in a joint effort to mislead Idaho creditors and loot Gulf's assets" (A 51a). The District Court went on to state that "[u]ntil recently the Ninth Circuit had not determined whether due process concerns would permit the forum contacts of one conspirator to be imputed to a co-conspirator," but that "cases" had "indicated that where positive law created an agency-type relationship, the jurisdictional contacts of the 'agent' could be attributable to the 'principal' " (A 52a, citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 419-20, 422-24 (9th Cir. 1977), and *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990)). Although the District Court referred to an "agency-type relationship" that was "created" by "positive law," the two Ninth Circuit decisions upon which the District Court relied—*i.e.*, *Wells Fargo* and *Sher*—were traditional agency cases in which the issue was whether an actual agency relationship existed under the particular facts of the case, not whether some fictional "agency-type relationship" was "created" by operation of some legal doctrine.

The District Court then affirmed the Bankruptcy Court's adoption of the "conspiracy" theory of jurisdiction on the basis of an erroneous interpretation of the Ninth Circuit's decision in *Underwager v. Channel 9 Australia*, 69 F.3d 361, 364-65 (9th Cir. 1995), which the District Court incorrectly interpreted as "express[ing]" the Ninth Circuit's "willingness to accept a conspiracy theory of jurisdiction" (A 52a). In fact, however, in *Underwager*, the Ninth Circuit merely observed that the plaintiff in that case, in attempting to assert jurisdiction over two out-of-state defendants, had "cite[d] two

district court opinions in which a conspiracy theory was applied." 69 F.3d at 364. Neither case was from the Ninth Circuit, and the Court of Appeals merely held that the two cases did not support the plaintiff's position. *Id.* at 364-65. Therefore, the propriety of a "conspiracy" theory of jurisdiction remains an open question in the Ninth Circuit.

The District Court did not further address the constitutionality of a "conspiracy" theory of jurisdiction other than simply to adopt the theory, in conclusory fashion, in reliance upon its misreading of *Underwager*.

**H. The Appeal To The Ninth Circuit**

On September 16, 1996, the District Court amended its order to certify it for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (A 31a-33a). Timely petitions by Petitioner and the Rowland Directors for permission to appeal to the Ninth Circuit followed. On October 11, 1996, the Ninth Circuit granted both petitions (A 27a-30a).

No doubt recognizing that personal jurisdiction over the Petitioner was simply not tenable under the law applied below, the Court of Appeals did not address the "conspiracy" theory of jurisdiction, the Idaho long-arm statute or due process issues that were addressed by the courts below. Instead, the Ninth Circuit found that the Petitioner was subject to jurisdiction in Idaho under Federal Rule of Civil Procedure 4 (k)(2), made applicable to the proceeding by recent amendments to Rule 7004 of the Federal Rules of Bankruptcy Procedure (A 1a-14a).

The Court of Appeals found that the December 1, 1996 amendments to Bankruptcy Rule 7004 were applicable to this proceeding. In making this finding, the Ninth Circuit held that amended Bankruptcy Rule 7004 could be applied retroactively without undue prejudice to the Petitioner, in part, because the Petitioner did not offer factual evidence that it would have behaved differently if it had expected amended

Bankruptcy Rule 7004(f) to apply (A 11a). This holding overlooks the fact that amended Bankruptcy Rule 7004 did not exist at the time factual evidence was submitted to the Bankruptcy Court, so the Petitioner never had the opportunity to submit any evidence relating to the applicability of the amended Rule or its effects on the Petitioner's conduct.

Until December 1, 1996, the date that the amendments to Bankruptcy Rule 7004 took effect, there was no basis for the courts to assert personal jurisdiction over Petitioner. And, as set forth above, the statutes of limitations applicable to the underlying causes of action had run by that date. Thus, the Ninth Circuit's retroactive application of the amendments to Bankruptcy Rule 7004 to the underlying adversary proceeding extends the statutes of limitations, a result that contravenes its own precedent and that of this Court.

## REASONS FOR GRANTING THIS PETITION

This appears to be the first and only Court of Appeals decision to date to address the question of whether amended Bankruptcy Rule 7004 should be applied retroactively to a pending adversary proceeding and thus is properly before this Court for review. By mechanically applying *dictum* from this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994), the Ninth Circuit has brought to life claims for relief against the Petitioner that never should have been brought in Idaho in the first place and which would have long ago been dismissed had the lower courts properly applied the law as it existed at the time those decisions were made. Such a result is neither just nor practicable and should not be allowed to stand.

## I. The Ninth Circuit Erred By Retroactively Applying The Recent Amendments To The Bankruptcy Rules To The Underlying Adversary Proceeding

In its order adopting the 1996 amendments to the Bankruptcy Rules, this Court stated that the amendments would apply to cases pending on December 1, 1996 only where it was "just and practicable" to do so. 1996 U.S. Order 96-14 (Order of the Supreme Court of the United States Adopting and Amending Rules, Apr. 23, 1996) (A 181a). To apply the new rule in these circumstances is neither just nor practicable. The purported jurisdictional events occurred more than five years earlier, this litigation was commenced nearly three years earlier, and this motion was brought nearly two years earlier than the effective date of the amended Rule. And, in all events, the statutes of limitations applicable to the underlying causes of action all had run by the time the amended Rule took effect. The application of the new Rule to this case would alter the rights of the Petitioner by providing a basis for jurisdiction that did not exist at the time of the events underlying this action, at the time the action was commenced, or at the time the motion to dismiss was made. It would also revive causes of action that would otherwise be barred by the applicable statutes of limitations.

In making this decision, the Ninth Circuit ignored its own precedent, which recognized that even where a statute is procedural in nature, it may be unjust to apply the statute retroactively. *Chenault v. United States Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994). In *Chenault*, the Ninth Circuit refused to apply a new limitations period to actions taken prior to the enactment of the new statute, as such application would revive a claim that otherwise could not have been brought. *Id.*[7] Application of the new Rule would subject

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[7] *Landgraf*, 511 U.S. at 291 (1994) (Scalia, J., concurring) ("Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered") (emphasis added).

Petitioner to a claim in Idaho to which it otherwise would not be subject. The new Rule would thus prejudice the rights of the Petitioner as well as increase its liability.

Whether a defendant reasonably anticipated being haled into court in a particular forum is at the heart of the jurisdictional inquiry here. At the time of the events in question, the Petitioner could not have anticipated being haled into court in Idaho.[8] Under the Rule in effect until December 1, 1996, the Petitioner's contacts with Idaho were insufficient to justify personal jurisdiction. This was implicitly recognized by the Ninth Circuit which refused even to address the application of the "conspiracy" theory of jurisdiction to Petitioner below. New Rule 7004(f) completely alters the jurisdictional test, allowing a defendant's aggregate national contacts to provide a basis for jurisdiction. The Bankruptcy Rule in place at the time of the activities underlying this action should therefore be applied. *Hoag v. Sweetwater Int'l*, 857 F. Supp. 1420, 1424 n.2 (D. Nev. 1994) ("personal jurisdiction should be assessed according to the long arm statute in effect at the time the claim arose. Because jurisdiction is limited to claims arising out of forum-related activities, due process requires that the defendant have fair notice that such activities may expose it to local jurisdiction").

In rendering its decision, the Ninth Circuit stated that "Defendants' argument that they could not reasonably have expected being haled into court in Idaho is unpersuasive since

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[8] Limits upon the assertion of personal jurisdiction which are based on defendants' reliance interest are well-established in our constitutional jurisprudence. And, in evaluating whether the exercise of long-arm jurisdiction comports with due process, this Court has emphasized the unfairness of requiring a party to litigate in an unanticipated forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (whether a defendant "should reasonably anticipate being haled into court" in the forum state is a crucial consideration, and due process "allows potential defendants . . . some minimum assurance as to where [their] conduct will and will not render them liable to suit").

they had at least to reckon with application of the Idaho long-arm statute to their dealings affecting Idaho creditors" (A 11a). But, as set forth in greater detail above, Petitioner's "conduct" could not lead to jurisdiction under the Idaho long-arm statute. The Petitioner had no contacts with Idaho whatsoever (A 123a), and the "conspiracy" theory, used to impute the alleged Idaho contacts of others to Petitioner, should not have been employed.

And, since amended Bankruptcy Rule 7004(f) was not even in existence at the time the motion to dismiss was submitted to the Bankruptcy Court, the Petitioner did not and could not submit any factual evidence to show how it would have behaved differently had it expected the amended Rule to apply. It was not possible for the Petitioner to have submitted evidence regarding the effects of amended Bankruptcy Rule 7004(f) because that Rule did not exist. At the very least, this case ought to be remanded to afford Petitioner the opportunity to present evidence of how its conduct would have been different if it had known that these amendments would apply. In all events, however, whether Petitioner would have changed its conduct if it had known the amendments would apply is not determinative. *Chenault*, 37 F.3d at 539 (focus on prejudice to defendant, not whether defendant would have altered its conduct).

The Ninth Circuit's reliance on this Court's decision in *Landgraf* is misplaced. There, this Court decided whether a non-jurisdictional remedial statute that created an additional remedy for sexual harassment claims should apply retroactively where there was *no indication* of whether the statute was intended to apply to cases that were pending when it became effective. *Landgraf*, 511 U.S. at 280.[9] In contrast, the

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[9] In *Landgraf*, this Court clarified that "prospectivity remains the appropriate default rule" and that *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974), which states that a court should apply the law in effect at the time of the decision, "did not alter [this] well-settled presumption." *Landgraf*, 511 U.S. at 272, 277. The Court

enabling order in the present case provides that the revised rules apply to pending cases only where "just and practicable" (A 181a). The Court made clear that, in deciding retroactivity, the first consideration is the expressed intent, if any, of the legislature, because if there is an express prescription, "there is no need to resort to judicial default rules" for deciding retroactivity. *Landgraf*, 511 U.S. at 280. In *Landgraf*, there was no such prescription, so the court relied upon a "deeply rooted" presumption against retroactivity. *Id.* at 265.

In *dictum*, the Court also observed that, in the absence of express prescriptions, statutes affecting jurisdiction "regularly" have been applied retroactively (*id.* at 274), cautioning, however, that "the mere fact that a new rule is procedural does not mean that it applies to every pending case," that the Court favored "the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case," and that "concerns about retroactivity" apply "to procedural rules." *Id.* at 275 n.29. The Court gave examples of prior cases in which the potential retroactivity of jurisdictional changes had been considered. *Id.* at 274. All but one of those cases involved changes in a court's subject-matter jurisdiction. The sole exception involved a change in rules relating to the location of the *res* for purposes of *in rem* jurisdiction; in that case the Court declined to apply the change retroactively. None of the cases involved a change in rules governing *in personam* jurisdiction.

Moreover, in the present case, unlike in *Landgraf*, there *is* an express prescription regarding retroactivity in the Supreme Court order that amended Rule 7004. Consistent with the "common-sense" approach referred to in *Landgraf*, the Supreme Court order expressly provides that the amendment should apply retroactively only "insofar as just and practi-

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distinguished cases such as *Bradley* which consider statutes involving issues that are separable from the cause of action and that do not impose an additional or unforeseeable obligation upon the defendant.

cable" (A 181a). Retroactive application of amended Rule 7004 to this case would contravene this prescription, because it would not be "just" in "the posture of the particular case" (*Landgraf*, 511 U.S. at 275 n.29). Up until December 1, 1996, there was no legal basis for jurisdiction over the Petitioner and the statutes of limitations on the underlying causes of action had already run. It would not be "just" to use a jurisdictional amendment to extend these statutes of limitations. The applicable considerations are no different from the ones that led the Ninth Circuit to conclude that legislation extending a statute of limitation should not apply retroactively because the defendant "would be forced to defend an action that was previously time-barred." *Chenault*, 37 F.3d at 539.

*McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), relied upon by the Ninth Circuit, is distinguishable because it did not require retroactive application of the statute. In that case, this Court examined whether applying an amended statute to a contract entered into prior to the amendment would unconstitutionally impair the contract. *McGee*, 355 U.S. at 224. The case was decided under the Contracts Clause of the Constitution, and the Court held that the statute "neither enlarged nor impaired respondent's substantive rights or obligations under the contract." *Id.* Unlike the present case, *McGee* was based on a contract with substantial connection to the forum. *Id.* at 223.

Another case relied upon by the Ninth Circuit, *Arrowhead Estates Dev. Co. v. United States Trustee (In re Arrowhead Estates Dev. Co.)*, 42 F.3d 1306 (9th Cir. 1994) is also distinguishable from the case at bar. The *Arrowhead* court considered the retroactive application of an amendment to Bankruptcy Rule 8002(a) that provided that a notice of appeal filed after the announcement of an order but prior to its entry would be valid.[10] *Arrowhead* addresses a technical amendment

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[10] Prior to *Arrowhead*, a notice to appeal filed before entry of an order had no effect. *Arrowhead*, 42 F.3d at 1309-10.

to the rules governing the manner in which an appeal can be taken. That rule merely eliminated a "trap" invalidating otherwise valid appeals based on a formalistic timing requirement. *Arrowhead*, 42 F.3d at 1310. In contrast, new Rule 7004(f) provides personal jurisdiction where jurisdiction was lacking prior to the enactment of the statute. Retroactive application of this rule thus implicates constitutional and fairness concerns about prejudice to a defendant's rights not present in *Arrowhead*.

The retroactive application of revised Rule 7004(f) to this matter by the Ninth Circuit prejudices the rights of the Petitioner and is neither just nor practicable. Accordingly, the Rule in force prior to December 1, 1996 that was applied by the lower courts should be applied here and the case should be dismissed.

## CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

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